

**MINUTES  
BOARD OF ADJUSTMENT  
THURSDAY, DECEMBER 4, 2014  
HOOD ROOM, MATTHEWS TOWN HALL**

**PRESENT:** Chairman Jim Jiles, Members, Walter Monestere, Cecil Sumners, Jim Mortimer, and Jeanne Moore; Alternate Members Jerry Meek, Gary Smith, and Peter Tuz; Attorney Robert Blythe; Senior Planner Jay Camp and Zoning Technician/Deputy Town Clerk Mary Jo Gollnitz

**CALL TO ORDER/INVOCATION:**

Chairman Jiles called the meeting to order at 7:02 pm and gave the invocation.

**APPROVAL OF THE MINUTES:**

Jeanne Moore motioned to approve the minutes of the November 6, 2014 meeting. Walter Monestere seconded the motion and they were adopted unanimously.

**SWEARING IN:**

The following were sworn in: Jay Camp, Cliff Boyd, Keith Powell, and Joel Causey

**VARIANCE REQUEST: BA 2014-10 MARA Cell Tower, 1200 S Trade Street**

**STAFF REPORT:**

Senior Planner Jay Camp stated that the applicant wished to have the voting members of the Board acknowledged by raising their hands. Mr. Camp noted that the applicant will be asking for a deferral on Variance Request BA 2014-11 later in the agenda.

Mr. Camp introduced the variance request BA 2014-10 explaining that this is part of a rezoning request for MARA ball fields. The Public Hearing will be held in January to rezone the subject property 227-46-175 at 1200 S Trade Street from RU to R/I (CD). Mr. Camp continued explaining that the RU district is an old district and is no longer supported in the UDO. It is a category that is being phased out. There may be two or three parcels in Matthews currently zoned RU. There has been several discussions regarding rezoning the property and MARA feels the time is now right.

Mr. Camp said that there is a stealth cell tower on the property that was constructed in 2009. It is an 80 foot monopole that is designed as a light pole in the center of the outfield. It is design to be undistinguishable. The variance request is for the extension of the height of the cell tower. Mr. Camp informed the Board that in 2013 the Town Board did amend the UDO which allows property within the R/I district to extend the height of a cell tower 40 feet above the maximum from 80 feet to 120 feet. The text requires the extension happen upon initial construction. He stated that the distinction for the variance request is for an existing stealth tower, not new construction. He further explained that this provision has never been acted on.

Mr. Camp noted that there is a three part process in order to construct the additional forty feet. The first portion is for this Board to grant a variance to allow for the second phase. The second phase is the Town Board allowing the height to increase and the finally phase is the rezoning approval. The variance approval does not actually approve the construction. It opens the door for the applicant to start the process.

Mr. Camp showed the Board an arial photo of the fields and surrounding neighborhood. He pointed out the cell tower location for the Board. He stated that the tower is approximately 270 feet from neighboring properties and is centrally located on the site. He further noted that it is twice the fall zone from neighboring properties.

Chairman Jiles asked if the existing location of the cell tower will stay where it is and will the field lights stay on the tower. Mr. Camp said that the ball field lights are what creates the stealth tower. He stated that MARA Holdings lease is for an equipment area at the base of the cell tower. Mr. Jiles wanted to confirm that staff is not anticipating any changes in the lighting. Mr. Camp said not to his knowledge.

Susan Irvin with Cole, Jenest & Stone representing MARA Holdings LLC and MARA addressed the Board. She stated that in attendance with her was Cliff Boyd, President of MARA; Keith Powell, managing member of MARA Holdings; and Joel Causey, Cole, Jenest and Stone. She stated that the notebook that was provided to the Board are copies of the power point she will be presenting. Included in the notebook are the exhibits.

Ms. Irvin stated that the applicant is requesting the extension on an existing communication tower. She noted that the text allows the extension only on initial construction. She stated that she will be providing a history and findings of fact regarding the request for the Board.

Ms. Irvin stated that the UDO does provided the some of the same conditions that the old zoning ordinance contained. However, there is an amendment that allows the extension of the 80ft tower in the R/I district. The prior ordinance allowed the eighty foot tower, but no extension. She explained that MARA leases to MARA Holdings approximately a 40 by 75 foot area within the Arthur Goodman Park. She showed the survey of the subject property and a copy of the approved light pole communication facility plans from 2009. That is the existing stealth light pole. She further noted that included in the information were the zoning approval and building permits. She stated that under the old and new ordinances the tower complies.

She reiterated that the applicant is asking for the forty foot extension. She noted that without the approved variance the company would have to remove the tower and build a new tower in this location. The hardship is that there is an existing tower that was approved and in order to extend the tower, the applicant would have to remove the tower and build a new tower.

Ms. Irvin went over the Findings of Facts stating that unnecessary hardship could be without the variance, the applicant would have to remove the tower and rebuild the tower. That is not reasonably necessary. She stated that even though the applicant was not able to build a 120 foot facility in 2009, the company did build a facility that could support the 120ft. She said that it makes sense that the extension be requested at initial construction in order to make sure the tower could support the 120ft height. She stated that included in the exhibits is the structural design report that verifies that the stealth light pole is designed to withstand the forty foot extension.

She continued stating that the one issue that the applicant is required to prove is that there are no special privileges that are being given that would be denied others in a similar situation. She stated that the argument is there are no similar situations. It is a unique complex in the community and there are no properties like this in the surrounding area. There are 13 athletic fields, associated amenities and light poles; this affords a unique opportunity for the stealth tower to exist and not be visible. She provided photos of the location of the existing pole/tower and a simulation of the light pole with the extension. She noted that the stealth facility blends in with the other lights.

Ms. Irvin stated that the applicant needs to show that the hardship is peculiar to the property. She reiterated that this is an unusual facility and the structure was originally engineered to support the additional height. It does not result from actions from the applicant. If the applicant could have constructed the higher facility at the time they would have. However it was not allowed at that time.

She continued stating that it is consistent with the spirit, purpose, intent of the ordinance, public safety is secured and justice is achieved. She noted that it does enhance emergency and communication coverage to the area. That would promote public safety and the advance quality of life for the community.

Ms. Irvin provided coverage maps of cell service in the Matthews area. She explained the hole in the middle of the map for cell coverage. She stated that the hole is where the cell tower in question is located. She further noted that the coverage in houses around the park is terrible. She showed the Board where the increase in tower height would provide additional coverage to the neighbors. That goes to the fourth point of quality of life.

Ms. Irvin went on to state that if the variance is denied the benefit of the public will be substantially outweighed by the harm suffered by the applicant. Without the variance they would have to remove the tower and rebuild. The result of extending the existing facility is not different than the result would be if they complied with the ordinance. In either case the result is a stealth light pole communication facility that blends with the lighting of the park. She stated that the last slide of the power point is the list of exhibits that are in the notebooks.

Cliff Boyd, 2014 President of Matthews Athletic and Recreation Association (MARA) addressed the Board. He stated that he confirms that the information that Susan Irvin presented in her power point presentation is accurate and true.

Keith Powell, managing member of MARA Holding LLC, approached the Board. He stated that they have the tower lease inside the athletic fields. He stated that the information that Susan Irvin has provided is accurate and true.

Ms. Irvin stated that the granting of the variance will not result in moving of the tower. She stated that the intent is to keep the light pole exactly where it is and keep it functioning the way it is now. Mr. Jiles asked if what the distance of the pole is to the nearest property line. Ms. Irvin stated that it was in the original zoning approval letter and it is just over 300 feet. The tower height is less than the distance to the property line. Mr. Jiles clarified that if the tower falls it will stay on their property. Ms. Irvin stated yes. She further noted that Exhibit 4 shows the distance of 301 feet to the nearest property line.

Jim Mortimer asked if there have been any comments from the neighbors who live around the ball fields regarding the change. Ms. Irvin said that they had a conversation with a neighbor who lives nearby and she also heard from their representatives that cell coverage is terrible in the neighboring homes. Mr. Boyd stated that he had received one phone call to clarify the packet of information they had received. He did not receive any comments or concerns from the neighborhood.

Mr. Jiles asked if the change in coverage would mean additional antennae. Keith Powell said that the additional height is for additional carriers. He noted that they currently have one carrier leasing. To get additional carriers they need additional height. He stated that Exhibit 6 shows the tower and it was originally design to handle four or more carriers. He continued stating that the spirit of Matthews ordinances is such that each additional carrier you have, you could receive additional tower height. They were thinking long term and it was beneficial to build it on the front end rather than adding to the tower after the fact. They planned for the future just in case it happened.

Jeanne Moore asked if the applicant would benefit because they have more carriers because of the extension. Mr. Powell stated yes that they have more interest from carriers to locate on the tower.

Cecil Sumners clarified that the applicant will sign all carriers that are interested or just two. Mr. Powell said that they would like to sign as many as they can. This general area, being close to downtown and the greater use of phones in everyday life they will have interested carriers.

Peter Tuz asked for clarification of the coverage map. Mr. Powell said that red is the strongest signal, yellow is the next step down and green is the lowest signal. Mr. Tuz asked where the current tower is located on the map. Mr. Powell pointed to the tower. Mr. Tuz asked why there is no real signal area

around the tower. Mr. Powell said that it is called an in building use. He explained that inside the buildings there is less signal strength and if you go outside the signal would reach farther. He stated that hearing from neighbors verifies that the map is accurate. Mr. Tuz stated that he has been at MARA parking lot and his wife has not been able to reach him at the other end of the park. He asked if the extension will help solve this problem. Mr. Powell stated that it will help solve a lot of the problems. Especially in the park and neighboring areas. It will not handle two miles out.

Jerry Meek asked how many cell towers are in Matthews and how many are eighty feet or above. Mr. Camp said the Town requires annual cell tower registration. He could not say for sure how many were in town. He continued noting that Matthews is a highly populated suburban area. It is hard to find adequate locations for taller cell towers once you move away from Independence Blvd. He explained how there are colocations on transmission towers.

Mr. Meek asked if there are any situations that the applicant would not be able to increase the tower from 80 feet to 120 feet. He continued asking that couldn't anyone who built a tower before 2013 increase the height. Ms. Irvin said that the decision to allow the increase is the Town Board decision and they have factors to consider in determining whether to allow the increase. She continued stating the photographs showing the tower and coverage maps must be provided. If you have a tower and there is already sufficient coverage in the area, that is part of what the Board would consider. They don't just give anyone an extension or on an initial construction. It depends on the appearance and coverage. She stated that the extension is only allowed in the R/I district and she has reviewed the zoning map. There are not that many properties zoned R/I as one would believe.

Mr. Jiles said the variance would apply when the zoning is changed. He asked for clarification that if the zoning does not go through the variance would be void. Attorney Bob Blythe said that it only applies in the R/I district and if the property is not R/I, it would not apply. Mr. Camp stated that the town does not allow communication towers in the single family residential districts. He showed the zoning map and that it is heavily dominated by residential districts. There are very few opportunities to locate in town. There is a table that states what heights can go in which districts.

#### **DELIBERATION:**

Chairman Jiles stated that this is a request for variance for increase in height of a cell tower.

#### **Finding of Facts**

1. There would be unnecessary hardship from strict application of the ordinance. *Mr. Mortimer said that if the applicant had to tear down the tower and rebuild it would be an additional expense for the new construction.*
2. Hardship results from the conditions that are peculiar to the property, without granting the variance. *Mr. Mortimer stated that there are ball fields and it would be difficult to relocate the cell tower. It is very limited.*
3. The hardship did not result from actions taken by the applicant or property owner. *Mr. Mortimer said it did not.*
4. The requested variance is consistent with the spirit, purpose, and intent of the title, because public safety is secured and justice is achieved. *Mr. Mortimer said that according to the petition the height increase would be safe because the tower was built for 120 feet and it is currently 80 feet. It would provide better coverage for the area which would be substantial justice and public safety. The proposed height of the tower is still a considerable distance from the neighboring property owners.*

Mr. Meek said that the unnecessary hardship is clear and action is clear. He continued stating that the variance is consistent with the spirit of the title. The question he is having difficulty with is #2 in that the hardship is peculiar to the property. The hardship results from the tower being built prior to 2013. Not by

virtue that it is on this property. Does this mean that any tower on property that is zoned in this way would be entitled to a variance to build to 120 ft. However, it is absurd to have them tear down the tower and build new. Ms. Moore stated that this is specific to the zoning district it is in now. Mr. Jiles stated that it is zoning specific. Mr. Meek asked if there are other towers built prior to 2013 in similarly zoned districts, would they be entitled to the increase. Mr. Camp clarified stating that the tower predates the 2013 text amendment and it is currently in the RU district, which the text amendment does not address. If there are other towers in the R/I district they could request the variance. Ms. Moore said that most towers were built prior to 2013.

Mr. Sumners asked if the zoning is R-12 can they automatically ask for a variance. Mr. Jiles asked if that the height is not allowed in other zoning districts. Mr. Camp said that increase would not be allowed in a single family residential district. Mr. Meek asked for clarification that if a property is in the R/I district with a tower that predated the 2013 text, they could apply and would be eligible for the variance. Mr. Jiles stated that they could apply and would be considered on their merits. Mr. Meek asked if the hardship they face is not peculiar to the property but peculiar to the fact that they have a tower that predates the ordinance and is in the R/I zoning. Mr. Blythe stated that this is not in the R/I zoning. That is the purpose of the rezoning request. He continued stating that staff stated that there are only two other R/U zonings in town.

Chairman Jiles reminded the Board whatever decision they come to, that it is dependent upon the rezoning approval. Mr. Camp clarified stating that the Board can grant the variance dependent upon successful rezoning to R/I. Mr. Sumners said that if the property stays RU it voids everything. Mr. Camp agreed. He continued stating that it is a three part process. This Board grants the variance, the Council has to specifically grant the actual extension and the rezoning.

Cecil Sumners made a motion to approve the variance request BA 2014-10, based upon the findings of fact and conditions of zoning being approved for R/I (CD) and the Town Board approving the condition for extension of the tower. Jeanne Moore seconded and the motion passed unanimously.

#### **VARIANCE REQUEST: BA 2014-11 MARA, 1200 S Trade**

#### **STAFF REPORT:**

Senior Planner Jay Camp stated that the applicant for variance request BA 2014-11 wishes to continue the hearing until the January Board of Adjustment meeting. Susan Irvin representing MARA approached the Board. She stated that they request the hearing be continued. She noted that Mr. Boyd and she met with planning staff today. The variance plan has evolved since August and they have been working with staff to distill what they need. The property is currently zoned RU and staff has asked MARA to rezone the property to R/I. In doing so, some of the elements of R/I do not conform to the location of the proposed improvements on the property and what exists on the property for developable area. They need to come back and ask this Board to consider in helping them conform in order that they are in the same position in terms of ball fields. She continued stating that it is very complicated. They will meet with staff on a regular basis until the January meeting in order to be on the same page with staff on what they are asking for and what they need. They would like to come back in January with a revised variance.

Ms. Moore asked if the applicant needed to take this portion of the variance request to the Council before they come back to the Board of Adjustment. Ms. Irvin said that they will be going to the Town Board on the rezoning January 12. She understands that this Board's January meeting will be rescheduled because the regular meeting falls on January 1. They have spoken with staff and are asking this Board to have your meeting after the January 12<sup>th</sup> Public Hearing. They will be able to address comments from Town Board and be better able to make specific variance requests.

Mr. Jiles stated that this is very complex and there are a number of variance requests on a zoning district that has not been approved. He does not feel that this Board can make the proper assessments prior to the rest of the processes. The applicant is requesting variances to a zoning classification that is not in place yet. He continued stating that the same is true for the variance approved earlier because it was a single variance request. However, to review nine to 12 items prior to having the zoning in place, he is not comfortable with that.

Mr. Sumners said that he was of the opinion that if you wanted a variance to the table of dimensional standards that you did this in the plans and the Town Board did the approval or disapproval of the innovative things the applicant wishes to do. Ms. Irvin said that she thought he had a good point. They have been going through the process with town staff since August. She continued noting that they are trying to find ways to simplify the variance request. The dilemma that MARA has is that they are making the conversion to R/I district at the request of the town. Right now the RU zoning gives MARA a 20 ft. setback on the side and rear yards and a 40 ft. front setback. With the R/I zoning MARA goes to 50 ft. setback all around the property. They are losing about 2 ½ acres that they could convert to ball fields or parking. She further noted that the reason that they are doing it this way is that she is not sure MARA would move forward with the rezoning if they are not being able to utilize the property up to the 20ft that they now have.

Ms. Moore asked if January may be too soon and February may be better. Ms. Irvin said that if they waited until February that would delay the rezoning. She does feel more comfortable since meeting with staff today. Ms. Moore said that she agrees with Mr. Jiles regarding making a decision on something that is not in place yet.

Mr. Jiles said they operate under the laws and regulation of the Board of Adjustment. They report to the Town when they approve a variance and that decision is binding. What is being asked is to make a determination on the basis of a zoning that has not been approved. They can do that in some cases. He believes that February is more reasonable. Mr. Blythe said that if the Board is going to continue a hearing they need to set a specific date.

Mr. Mortimer said that the Public Hearing will be January 12. The Planning Board will meet later that month and that February may be best. There was discussion on dates and when other boards would be meeting in the January and February.

Mr. Camp provided a procedural update for the Board. He stated that for a rezoning to be approved it would have to meet all the standards of the ordinance. In some cases, this Board needs to grant variances before the rezoning is enacted. Otherwise it would be illegal. He continued stating that the Town Board holds the Public Hearing, then the Planning Board reviews the application and then just before the final decision date this Board reviews the variance requests. Those are conditioned upon the successful rezoning approval. He continued stating that in the long list of variances there are some fundamental variances such as the yard requirement. The property is legal nonconforming today. With a variance approval then it is legal. There are other standards that are more optional. Ms. Moore asked if it is all contingent upon. Mr. Camp said that it will always be contingent upon. Mr. Blythe said that we have always had this.

Mr. Sumners said that on the rezoning that he was involved in that the plans listed the changes based on the table in the ordinance and the Town Board was to approve the change. He asked that if now this Board is going to set the variances. Mr. Camp informed the Board that Mr. Sumners was referencing a rezoning for an apartment development downtown near his home. He continued stating that the rezoning was one of the categories that uses innovative development standards. Those standards allow a developer to come in and request a reduced setbacks or yard during the zoning process therefore bypassing the Board of Adjustment. That is a flexible design district. He stated that there is a distinction between that and a traditional parallel zoning district. In this case a variance is the only vehicle that the applicant has to change what is currently on the property.

Ms. Moore said that this is good discussion because everyone had questions. Mr. Camp agreed stating that it will make the next hearing easier for everyone.

Mr. Jiles said that they have a number of variance requested. He continued stating that the requests impact back yards, screenings, fence requirements and we do look at the impact to neighbors. We do not have any of that information yet. Mr. Camp stated that the Public Hearing has not been held yet. All of the owners have received notice of the variance requests. The Town Board will receive input at the Public Hearing on January 12. All that information will be available to this Board if the hearing is delayed. Mr. Jiles said that they need to have that in hand.

Mr. Blythe cautioned the Board stating that acting on what is in a legislative hearing, is not the same as basing it on sworn testimony here. The Board must divorce themselves from what they may hear at the Public Hearing. Mr. Jiles clarified that it is what is presented at the meeting. Mr. Blythe said yes, it is the sworn testimony.

Mr. Camp said that there is another applicant with several variances that are tied to another rezoning. It is five or six variances and staff feels it would be best if this hearing does not happen on the same night as MARA. He asked the chair to move the regularly scheduled January meeting from the 1st to January 8, 2015. Staff has that tentatively set for the restaurant applicant 2014-622. Then January 22 or 29 they would hold the meeting for MARA.

Mr. Blythe said that the variance request that is being deferred must have a set date before they leave tonight. Mr. Jiles made a motion to continue hearing BA 2014-11 until January 22, 2015. The motion was seconded by Walter Monestere and the motion carried unanimously.

**ADJOURNMENT:**

Jim Mortimer moved for adjournment. Jim Jiles seconded the motion and the meeting adjourned at 8:15 pm.

Respectfully submitted,



Mary Jo Gollnitz  
Zoning Technician/Deputy Town Clerk